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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1025~~ 70-77

NORTH CAROLINA,

Petitioner

—v.—

WAYNE RICE,

Respondent

On Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit.

BRIEF FOR RESPONDENT

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IN THE

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No. 1325

NORTH CAROLINA,

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—v.—

WAYNE RICE,

Respondent

On Certiorari From The United States Court of Appeals For The Fourth Circuit.

BRIEF FOR RESPONDENT

Opinion Below

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 434 F.2d 297 (1970).

Jurisdiction

Jurisdictional requirements arising under 28 U.S.C. § 1254(1) are satisfied in that review of this civil case was granted on April 5, 1970, following petition of one of the parties for a writ of certiorari after rendition of judgment by the court of appeals.

Question Presented

Did the court below correctly conclude that a state denies due process of law when it imposes an unexplained harsher sentence upon a defendant following retrial for the same offense from which he appealed his conviction pursuant to the only avenue of review which the state affords, namely, appeal for retrial de novo?

Statement of the Case

On July 19, 1968, Mr. Wayne Rice was tried in the General County Court of Buncombe County, North Carolina, upon his plea of not guilty to a charge of driving while intoxicated. Although the alleged offense was subject to punishment by two years in prison (see N.C.G.S. §§ 20-138, 20-179 [since amended]), the offense was nonetheless described as a mere "misdemeanor" under North Carolina law. (See *State v. Morris*, 275 N.C. 50, 165 S.E.2d 245 [1965]). Accordingly, under North Carolina law exclusive original trial jurisdiction rested solely with the General County Court,[1] *i.e.*, Mr. Rice had no election to be tried in a Superior Court and was compelled by law to submit to the jurisdiction of the General County Court in the first instance.

As acknowledged in Petitioner's Brief (p. 8), a defendant subjected to trial in a General County Court has no right to trial by jury nor does that Court make any record of the trial proceedings respecting the voluntariness of pleas, admissibility of evidence, or any other matter. Additionally, the State makes no provision for court assignment of counsel to represent indigent defendants in this court nor does it require that the judge, elected from the county, possess any legal training or experience whatever.[2] Thus,

[1] N.C.G.S. § 7-728: "The general county court shall have exclusive original jurisdiction of all * * * criminal offenses committed in the county below the grade of a felony as now defined by law. . . ."

[2] The subconstitutional character of the general county court is reviewed and discussed in Roy W. Davis, "Courts Commission: A Report on the Courts and the Court Business of the 28th Judicial District," *Studies for the Court Commission*, vol. 2, no. 83 (Nov. 1964). See also Fred G. Crumpler, "Com-

although Wayne Rice was charged with an offense punishable by two years in prison—an offense which by federal standards is a felony and by any standards is well above the level of petty offense—he was compelled to stand trial before a subconstitutional court lacking the essential rudiments of due process solely as a consequence of the state's determination to try him there without choice of his own.

Found guilty by the judge of the General County Court, Wayne Rice was sentenced to nine months in prison suspended upon payment of a $100 fine plus costs. This was Mr. Rice's first conviction for driving while intoxicated. Shortly following his conviction, "exercising the *only* avenue afforded to review his conviction,"[3] Mr. Rice appealed to the Buncombe County Superior Court. Two weeks later, on August 2, 1968, he was tried again in that Court and again found guilty, albeit in this instance the determination was made by a jury and Mr. Rice was represented by court-appointed counsel. The presiding judge of the Superior Court then proceeded to impose upon Mr. Rice an active sentence of two years in prison—the maximum allowed by law.

The judge's reasons for imposing this remarkably harsher sentence nowhere appear in the record. Rather, "the record reveals nothing which warrants the increased punishment."[4] All that appears is that as a result of exercising his sole statutory right to appeal, that providing for trial de novo with sentence to be imposed by the court, Wayne Rice found himself sentenced to two years in prison

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ments from Judicial Officials, a Report to the Committee on Improving and Expediting the Administration of Justice in North Carolina of the North Carolina Bar Association," *Studies for the Court Study Committee* 1956-1958, vol. I, 22:

> It was of interest to note that two of the lower court judges did not know what rules of procedure applied in their court.
>
> • • •
>
> One judge whose answer is in accord with the majority replied: "No, I do not think that jury trials would improve the lower courts as in cases with attorneys and with a jury most of the defendants would be found not guilty."

[3] *Rice v. North Carolina*, 434 F.2d at 299. (Emphasis added.) The operative state statute applicable to such an appeal was N.C.G.S. § 15-177.1.

[4] *Rice v. North Carolina*, 434 F.2d at 300.

whereas, had he been willing to forego his only access for review of any kind of his original conviction, he would have had to pay a $100 fine plus costs. Reviewing this case in light of the Supreme Court's decision in *North Carolina v. Pearce*, 395 U.S. 711 (1969), the United States Court of Appeals for the Fourth Judicial Circuit observed:

> [W]e see again the more drastic sentence on the second trial as a denial of Federal due process, in that by discouragement it impinges upon the State-given appeal.
>
> *Rice v. North Carolina*, 434 F.2d at 300.

Concluding that injurious consequences might well inhere in the uncorrected record of this harsher sentence which the Court of Appeals held to constitute a violation of due process, it ordered that the record be expunged. Thereafter, the State filed timely petition for a writ of certiorari which this Court granted on April 5, 1971.

In brief, the case reflects the following factual and generic circumstances for determining the proper application of this Court's decision in *North Carolina v. Pearce*:

a) The court before which the defendant was first placed in jeopardy was not a court whose jurisdiction was confined to the disposition of petty offenses or minor misdemeanors; it was, rather, a court of primary criminal jurisdiction over all offenses subject to punishment by as long as two years in prison.

b) The accused makes no choice whatever to be tried in this court rather than in some other. The accused is not permitted by law to bypass this court, he makes no election whatever as to whether he might instead be tried in a court of due process, and he is wholly without recourse to any other court until after being sentenced by this court.

c) Within this General County Court, the accused is subjected to trial without benefit of a jury; there are no transcribed proceedings respecting the voluntariness of pleas or circumstances respecting the admissibility of evidence; though he may be indigent there is no provision for appointment of counsel; the presiding judge need have no training or experience in the law; and all that is recorded is the charge, the plea, the finding of guilt, and the sentence.

d) The sole recourse of the accused from any conviction found or sentence imposed by this court is exclusively by way of appeal

for retrial de novo in a Superior Court; by no other means does the state afford any review of the consequences of his conviction.

e) Sentence subsequently imposed in the event the accused pursues his only recourse for review and correction of his original conviction may be freely extended to its statutory maximum in the sole decision of the judge of the court in which that appeal is taken, *i.e.*, the jury is not involved.

f) No reason whatever is required to be given or recorded in explanation of an extended sentence thus imposed with the consequence that the harsher sentence is itself functionally immune from meaningful constitutional review.

Argument

I. *The Decision Below Is Correct and Controlled by this Court's Decision in North Carolina v. Pearce.*

The imposition upon Rice of a harsher sentence after retrial for the same offense was a clear violation of due process principles confirmed by this Court in *North Carolina v. Pearce*, 395 U.S. 711 (1969). The issue presented in *Pearce*, as stated by this Court, is exactly the same as the issue identically resolved by the court below in this case:

> When at the behest of the defendant a criminal conviction has been set aside and a new trial ordered, to what extent does the Constitution limit the imposition of a harsher sentence after conviction upon retrial?
>
> 395 U.S. 711, 713.

In answer to that question, this Court declared:

> [S]ince the fear of . . . vindictiveness may constitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, Due process . . . requires that a defendant be freed of apprehension of such a retaliatory motivation.
>
> 395 U.S. 711, 725.

It warrants emphasis that the Court was explicitly concerned with the discouraging effects of the accused's reasonable fears and apprehensions of retaliatory harsher sentencing upon his statutory right of appeal, and not with the rare instance where the fact of retaliatory sentencing is betrayed on the face of the record. (Cf. the separate Opinion by Mr. Justice Black, 395 U.S. at 739-40. See *United*

States v. Wiley, 278 F.2d 500. [7th Cir.]). Indeed, the Court specifically footnoted in Pearce a poignant instance that such fear of vindictive harsher sentencing had played in throttling the right to appeal (395 U.S. 725 at note 20), and it acknowledged the evidence of frequent increased sentences in North Carolina itself as providing ground for an appellant's anxiety. See also Aplin, *Sentence Increases on Retrial after North Carolina v. Pearce*, 39 U. Cin. Law Rev. 427 (1970). Accordingly, this Court held in *Pearce* that:

> [W]henever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.
>
> 395 U.S. 711, 726.

The State in this case failed to produce any record whatever in explanation of the doubly severe harsher sentence imposed upon the Respondent by the judge who sentenced him following retrial. There is, of course, nothing whatever in the Superior Court record to provide the slightest basis for any inference that the escalated punishment could possibly have been founded on "objective information concerning identifiable conduct" on Mr. Rice's part during the brief two-week interval between the first and second sentences. Accordingly, the court below readily concluded that the harsher sentence was imposed in violation of the Due Process Clause of the Fourteenth Amendment.

Indeed, for the Fourth Circuit Court of Appeals to have done otherwise would not only have been to recede from *Pearce*, which the fourth circuit had itself decided and which it had anticipated in *Patton v. North Carolina*, 381 F.2d 636 (1967), *cert. denied*, 390 U.S. 905 (1968), it would have invited an extraordinarily ironic wholesale circumvention of *Pearce* by the several states within its jurisdiction: to limit *Pearce* short of the right of appeal for retrial

de novo of criminal charges punishable by *substantial* prison terms would have explicitly encouraged each state to undermine the fourteenth amendment by processing serious criminal charges in subconstitutional courts while limiting access to corrective processes to those defendants with sufficient fortitude to brave the risk of unexaminable harsher sentences on appeal for retrial de novo.

Respectfully, this is in fact the question now before this Court as well: either to affirm the decision below or to recede from *Pearce*, and thereby to provide an encouragement for other states to commit the trial of non-petty criminal charges to stripped-down, subconstitutional courts lacking the rudiments of due process, while systematically discouraging appeals through the implicit threat of essentially unreviewable, retaliatory harsher sentencing associated with the accused's sole avenue of appeal—an appeal for retrial de novo.

It is significant to note in this respect that as his predecessor declined to join in Florida's plea that Minnesota associate itself with Florida's position in *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Attorney General of Minnesota has similarly declined to embrace North Carolina's position in this case as well.[5] Noting first that harsher sentencing following any trial de novo has been abandoned as a matter of judicial policy in Minnesota's largest metropolitan county since 1968, and that "the statistics for 1970 . . . reflect that no flood of appeals has occurred," the Minnesota Attorney General replied to the North Carolina Attorney General in response to the latter's solicitation for a brief amicus curiae:

> I also have some doubt as to the propriety of using the sentencing process to effect improvements in the court calendar.
>
> . . .
>
> And in those cases where the de novo jury trial must be provided as a matter of constitutional mandate, deterring appeals by use of heavier sentences would seem to run afoul of *North Carolina v. Pearce*, 395 U.S. 711 (1969).

[5] The Attorney General's letter to the North Carolina Attorney General is reproduced in full at p. 20 of this Brief.

. . .

Because of the doubts I have expressed, and because our statistics do not provide support for your position, it does not appear that we will be able to join it.

Very truly yours,
WARREN SPANNAUS
Attorney General

Identically, and again as a matter of judicial policy, the Supreme Court of New Jersey has moved to forbid harsher sentencing following appeal from state municipal courts for retrial de novo:

> [W]e are satisfied that as a matter of policy and apart from constitutional compulsion, a defendant who appeals from a municipal court should not risk a greater sentence. In reaching that conclusion, we are mindful of the reason for a trial de novo in these matters. The Legislature long ago provided for a retrial at the county level because of the weakness inherent in the system of local courts whose judges were locally appointed, served part-time, and frequently were not even members of the Bar. * * * Although the municipal court of today is much improved over its ancestors, the structure remains unsound. * * * We intend no reflection upon the many judges of the municipal courts who work hard and conscientiously notwithstanding the shortcomings of the system itself. *Rather we recognize that, so long as this system endures, the need remains to afford the litigant, frequently a stranger to the locality, the opportunity to seek a redetermination by a court at a higher level without the risk of a larger penalty.*
>
> *De Bonis v. State*, 9 Crim. Law Rptr. 2109 (1971) (New Jersey Supreme Ct., April 8, 1971)

Having no similar power in this case directly to revise the policy of the North Carolina Supreme Court which has adamantly declined to restrict harsher sentencing following appeals for retrial de novo in North Carolina (*State v. Spencer*, 276 N.C. 335, 173 S.E.2d 765 [1970]; *State v. Sparrow*, 276 N.C. 499, 173 S.E.2d 897 [1970]), the Fourth Circuit Court of Appeals correctly concluded that the command of the fourteenth amendment itself must still control:

> On the strength of *Pearce*, we again see the more drastic sentence on the second trial as a denial of Federal due process, in that by discouragement it impinges upon the State-given appeal.
>
> 434 F.2d at 300.

The *a fortiori* application of *Pearce* to *Rice* had already been anticipated in *Torrance v. Henry*, 304 F. Supp. 725 (E.D.N.C. 1969). Like *Rice*, *Torrance* arose on petition for a writ of habeas corpus in behalf of a North Carolina prisoner who, after being convicted in an inferior court and appealing to the Superior Court, was tried de novo, convicted again of the same offense, and given a heavier sentence than had been imposed by the inferior court. In his opinion, Chief Judge Butler observed:

> Applying the reasoning underlying *Pearce*, we perceive no material distinction between a case where the defendant's original conviction has been set aside, whether by appeal or collateral proceedings, and a new trial ordered, and a case where the defendant has appealed his original conviction, and received a trial *de novo*. In either case a harsher sentence at retrial is a violation of due process, unless justified by the subsequent events requirement as enunciated in *Pearce*.
>
> 304 F. Supp. 725, 726.

Similarly, the application of *Pearce* to all appeals for retrial de novo has been applied by state court decision in Maryland, *Cherry v. Maryland*, No. 244 (Md. Ct. of Spec. App., May 6, 1970), and, apart from the parallel state court decisions already noted from New Jersey and Minnesota, even that minority of states which retain the basic arrangement of appeals for retrial de novo find no uniform need for the retention of this *in terrorem* device. For instance, the applicable provision in New Mexico flatly forbids an increase in sentence for any reason whatever:

> *New Mex. Rev. Stat. Ann. 36-15-3:* Appeals—District court proceedings. —A. Appeals from the magistrate court shall be determined by trial de novo in the district court, and all laws, rules and regulations governing the magistrate court shall govern the trial in the district court.
>
> • • •

> B. (2) in a criminal action, the district court *shall enter judgment imposing the same or a lesser penalty as that imposed in the magistrate court in the action.*
>
> (Emphasis added.)

In other jurisdictions, such as Washington, the possibility of an extended sentence following appeal and retrial de novo is significantly restricted to a maximum penalty associated only with *petty* offenses:

> *Rev. Code Wash. Ann. 3.50.410:* Superior court trial de novo—Jury trial—Maximum punishment—Appeal to supreme court.
>
> In the superior court the trial shall be de novo. * * * If the defendant be convicted in the superior court, he shall be sentenced anew by the superior court judge with a fine of *not to exceed five hundred dollars or imprisonment in the city jail not to exceed ninety days,* or by both such fine and imprisonment. Appeals shall lie to the supreme court of the state of Washington as in other criminal cases in the superior court.
>
> (Emphasis added.)

Contrary to North Carolina's argument in this case, therefore, the great majority of state practices will be wholly unaffected by affirmance of the decision below. The majority of states do not utilize appeals for retrial de novo at all and are otherwise already bound by *Pearce* itself. Of the minority of states that do utilize appeals for retrial de novo, several have already moved as a matter of judicial policy to forbid the imposition of harsher sentence upon retrial, the legislature of another has forbidden the practice by statute, and in still other states the possibility of a harsher sentence is distinguishably limited to sentences following retrials of purely petty offenses.

North Carolina nonetheless contends that *Pearce* ought not be followed in this case, in large part from its concern that more appeals might then be taken from the judgments of its subconstitutional courts than are currently carried forward by the smaller number of defendants now willing to risk the peril of an unexaminable heavier sentence. (See Petitioner's Brief at p. 12.) One sufficient answer to this argument is simply to emphasize again the unsupported

and wholly conjectural nature of its claim, the *fact* that there is no evidence of any such tide of appeals where harsher sentencing recently has been prohibited elsewhere (*e.g.*, Minnesota since 1968, New Mexico since 1968), and the fact that the vast majority of states do not use subconstitutional courts at all for the trial of criminal cases above the level of petty offenses. So draconian an economy has evidently seemed neither necessary nor appropriate to any of the great majority of states in spite of the common and very real problem of congestion in their courts.

A second and related observation is the remembrance that the fourteenth amendment does not succumb to the inconveniences of compliance. To paraphrase Mr. Justice Brandeis, the guarantee of due process exists "not to promote efficiency but to preclude the exercise of arbitrary power." *Myers v. United States*, 272 U.S. 52, 293 (1926) (dissenting Opinion). It is unquestionable that we are here concerned with *arbitrary* power, moreover, since the *Pearce* rule limits the authority to impose harsher sentences specifically by a standard which, when observed, only then makes it possible subsequently to determine whether the harsher sentence was improperly motivated:

> In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, *so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.*
>
> *Pearce* at 726. (Emphasis added.)

A rule more permissive than *Pearce* by any degree would necessarily undermine its concern for due process by providing latitude for arbitrary harsher sentences beyond discovery by subsequent review, and correspondingly discouraging the accused in the exercise of his statutory right of appeal. This specific function of the explicitness of the

Pearce rule to curtail the risk of *arbitrary* power in the use of the sentencing power so far as it affects rights of appeal has been acknowledged again, more recently:

> [D]ue process forbids the States from adopting procedures that would defeat the institution of federal judicial review. * * * [D]ue process of law is denied by state procedural mechanisms that allow for the exercise of arbitrary power without providing any means whereby arbitrary action may be reviewed or corrected. * * * If there is any way in which these propositions must be qualified, it is only that in some circumstances the impossibility of certain procedures may be sufficient to permit state power to be exercised notwithstanding their absence.
>
> * * *
>
> Even if it be assumed that juries are incapable of making such explanations, we have already held that such inability does not excuse the State from providing a sentencing process that provides reasons for the decisions reached if those reasons are otherwise required. *North Carolina v. Pearce*, 395 U.S. 711, 726 (1969).
>
> *McGautha v. California*, 39 U.S. LAW WEEK 4529, 4549, 4554 (1971) (dissenting Opinion)

Thus, when the state commits exclusive original trial jurisdiction of offenses punishable by two years in prison to a subconstitutional court, with access to review limited solely to appeal for retrial de novo and sentence imposed by the judge, there can be no doubt either of the feasibility or the necessity of applying the *Pearce* rule as a limitation to avoid the risk and the discouraging effects of the risk of arbitrary harsher sentencing.

Finally, it is respectfully submitted that to the very extent that North Carolina means what it has declared in its Brief—that the maintenance of a system imposing the unrestricted risk of harsher sentencing upon all those taking an appeal for retrial de novo is essential to its judicial order precisely *because* it discourages appeals (and not in spite of the implicit tendency of such a system so to discourage appeals)—the State in essence is claiming a prerogative to entertain precisely that policy which the Court has already declared to be prohibited by the Constitution:

> A court is "without right to . . . put a price on an appeal. A defendant's exercise of a right of appeal must be free and unfettered. . . . [I]t is unfair to use the great power given to the court to determine sentence to place a defendant in the dilemma of making an unfree choice."
>
> *Pearce* at 724.

To the extent that appeals for retrial de novo previously may not have been taken from the subconstitutional courts of North Carolina solely from anxiety of the accused that a functionally unreviewable harsher sentence might subsequently have been imposed, the indiscriminate discouragement of those appeals which discouragement the State now seeks to advance as its principal argument to this Court is precisely the appalling condition which the explicit holding in *Pearce* was surely meant to end.

Indeed, the case now before the Court is distinguishable from *Pearce* only to the extent that it is more aggravated than *Pearce*. There can be no question that "apprehension of a retaliatory motive" (*Id.* at 725) respecting sentencing after retrial de novo must as readily discourage County Court defendants from seeking relief on appeal as in the case of those originally tried in the Superior Court. But though the degree of apprehension must be at least as great in the one case as in the other, the average defendant's predicament in the case of one first convicted and sentenced in a General County Court is doubtless more often genuine than in the case of one first convicted and sentenced in a Superior Court: the less professional and less circumspect operation of the General County Court is itself much more conducive to the probability of serious error in the proceedings of that Court than is likely in a Superior Court. As a consequence, the uniform degree of discouragement to appeal applicable to both cases must tend in fact to yield a greater proportion of unfairness to those subjected to trial in the subconstitutional conditions of the General County Court, than in the circumstances of the *Pearce* case itself.

Indeed, were the larger issue otherwise appropriately before this Court, Respondent would not hesitate to suggest

that the use of subconstitutional courts with exclusive original jurisdiction over anything more substantial than purely petty offenses is itself a practice violative of due process, by no means adequately redeemed simply by permitting the accused *thereafter* to appeal for a fundamentally fair trial as a matter of right. But in any case, for the State additionally to hobble the statutory right of the accused to appeal from such a predicament with the further discouragement of subjecting him to the risk of an essentially unreviewable harsher sentence should he be so bold as to exercise that right, is clearly intolerable. On principle and from every fair factual comparison with the less alarming situation in *Pearce* itself, it is clear that the decision of the Fourth Circuit Court of Appeals in this case can only be affirmed.

In reaching this conclusion as Respondent respectfully submits it must, this Court need not be indifferent to several concerns otherwise appropriately reflected in Petitioner's Brief (and partly shared by the amicus briefs of Maine and Utah). First, this Court may, as it deems appropriate, limit its decision to cases such as this one in which offenses punishable *by more than six months in prison* are originally subject to trial solely in courts in which essential due process safeguards are not provided (*e.g.*, courts without trial transcripts recording the voluntariness of pleas, admissibility of evidence, etc.; courts in which trial by jury is denied; courts unauthorized to appoint counsel in behalf of unrepresented indigents). Accordingly, any state so desiring would remain at liberty still to utilize a dual trial court system with respect to purely *petty* offenses, free from concern that the *Pearce* restriction limiting harsher sentencing upon retrial de novo might otherwise lead to a substantial increase in appeals by relieving even petty offenders of their anxiety of retaliatory harsher sentences. Such a distinction finds some support in other decisions of this Court and yet keeps at least minimum faith with *Pearce*. (Compare *Gideon v. Wainwright*, 372 U.S. 335 [1963] and *Patterson v. Warden*, 372 U.S. 776 [1963] with *Winters v. Beck*, 239 Ark. 1151, 397 S.W.2d 364 [1966],

cert. denied, 385 U.S. 907 (1966) and *DeJoseph v. Connecticut*, 3 Conn. Cir. 624, 222 A.2d 752, 771 (1966), *cert. denied*, 389 U.S. 902 (1967). See also *Baldwin v. New York*, 399 U.S. 66 [1970] ["no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for *more* than six months is authorized."]) (Emphasis added.)

Second, assuming—as Respondent respectfully believes is more in keeping with *Pearce* (and as the Supreme Court of New Jersey has otherwise found essential and as New Mexico provides by statute)—that the constitutional limitation on harsher sentencing applies irrespective of the nature of the offense first required to be submitted to trial in an inferior court with sole access for review restricted to an appeal with retrial de novo, this Court may nonetheless take pains to correct the mistaken impression of North Carolina that such an application of *Pearce* would either force its inferior courts to make full trial records or, alternatively, preclude a Superior Court from ever increasing the sentence following trial de novo. See Petitioner's Brief at pp. 8-9.) It need only be pointed out that under *Pearce*, the presence or absence of a trial transcript from the first trial is utterly irrelevant as to whether a subsequent judge may impose a harsher sentence. Rather, a harsher sentence may be imposed only if

> based upon objective information concerning identifiable conduct on the part of the defendant occurring *after* the time of the original sentencing proceeding.
>
> *Pearce* at 725. (Emphasis added.)

As a consequence, no point would be served in this regard were the State to add to the expense of operating its subconstitutional courts by now providing for a full record of the trial, nor would any advantage thereby be gained so far as the latitude of subsequent harsher sentencing is concerned. (Correspondingly, it is also clear that application of the *Pearce* rule to sentences followed by appeal for retrial de novo would not in the least induce any change of practice among states providing for no full record of the

original trial, *i.e.*, the "cost" of applying *Pearce* to retrials de novo is simply not as great as the alleged concern of Petitioner would otherwise imply.)

Third, the Court may appropriately point out that the state is free in the alternative simply to upgrade its inferior courts with jurisdiction above the level of petty offenses, so to provide a full transcript of all proceedings therein, and then to restrict the defendant to right of appeal on alleged errors of law alone. By such an adjustment, the state may wholly dispel its concern that the present statutory right to retrial de novo may unnecessarily invite appeals in cases where there may in fact have been no error.

Finally, the Court could find that it is only in cases where the accused has no choice respecting the character of state court in which he is first submitted to trial that *Pearce* must necessarily apply to protect him from fear of an unexaminable harsher sentence following an appeal and retrial de novo. Were the defendant given a choice in the first place, and were he freely to exercise it to elect the informality of a subconstitutional court with absolute right to appeal for retrial de novo in the more formal court in which he could have chosen to be tried originally, then it may indeed be reasonable to treat the case as though the "slate has truly been wiped clean" and to proceed upon retrial without reference to whatever sentence may have been imposed by the inferior court. The obvious reasons for this suggested distinction are twofold. First, as the defendant may originally forbear from requesting trial in the superior court principally in hope of more lenient treatment under the informal auspices of the inferior court, it may not be unjust that should he subsequently appeal to the superior court he should submit to its judgment on the same footing as another originally electing to be tried there. Second, to the extent that the superior court judges are understood to have an interest in maintaining the usefulness of inferior courts as courts of first instance, there is markedly less reason for a defendant to fear that his willingness to be tried in such a court so long as it is buttressed with a right to appeal for retrial de novo should he feel himself to have been unjustly convicted or sentenced, will be discouraged through

the use of unexaminable harsher sentences on appeal. In this respect, *i.e.*, cases arising in any jurisdiction providing an election to the defendant for trial in the superior court or trial in a subconstitutional court with right of appeal for retrial de novo in the superior court, there is indeed neither reason for the defendant to fear that the superior courts will be motivated by improper considerations nor reason to discourage whatever judicial economy the state may feel is to be derived from such an arrangement.

North Carolina does not, of course, provide for any such election by the accused nor did it do so for Wayne Rice. Rather, it forces an accused through trial and sentence in a subconstitutional court intrinsically prone to error, thereafter intimidating him by an exclusive de novo system which he knows to contain a built-in emphasis on the discouragement of any appeal from the subconstitutional court. This system is one which advises him that his only recourse is by way of appeal for retrial de novo subject to the power of the presiding judge to levy upon him an even harsher sentence functionally immune from further examination. The depressing impairment of fourteenth amendment rights under this system is an extreme and indefensible condition operating to deprive the accused of his liberty without due process of law. The Fourth Circuit Court of Appeals properly held it to be so, correctly relying upon this Court's decision in *Pearce*. The decision of that court should be affirmed, observing at the same time that the decision takes away nothing whatever from the state's capacity to reconcile fairness with efficiency in the administration of its laws.

II. *The Restriction of Respondent's Constitutional Right to Trial by Jury Denied Him Due Process of Law.*

It is well established by settled decisions of this Court that Wayne Rice, having been charged with an offense punishable by more than one year in prison, had an absolute right to trial by jury. *Baldwin v. New York*, 399 U.S. 66 (1970); *Duncan v. Louisiana*, 391 U.S. 145 (1968). He was clearly denied that right in that he was compelled to sub-

mit to trial upon his plea of not guilty without right to have his guilt or innocence determined by a jury. The state correctly concedes in its brief (at p. 8) that jury trial is not provided in a General County Court and, as previously noted, the accused was given no choice to be tried in any court which did provide for that right. *A fortiori*, the decision below should be affirmed on this basis alone.

North Carolina may contend that the Respondent was not utterly denied any access to trial by jury by suggesting that although he was indeed placed in jeopardy of punishment exceeding a year in prison in a proceeding denying that right, he remained free *thereafter* to seek retrial de novo with the benefit of trial by jury. The contention must fail, however, for each of two reasons. First, there is simply no authority whatever for the curious view that the right to trial by jury may be postponed until after jeopardy has attached, trial has proceeded through verdict, and sentence has been imposed! So to disparage a constitutional right is wholly inconsistent with the function of its explicit guarantee. So to sanction its postponement is to hypothecate the Bill of Rights, to hobble the accused, and to subject him to the ordeal of preliminary trial the harassment of which he is powerless to avoid. It is, with all respect, an Alice in Wonderland world in which the State, as the Queen of Hearts, declares: "Sentence first, trial by jury later!"

Second, the contention must fail in any case because of the price which the state attaches to the defendant's postponed right to trial by jury—the price that he must subject himself to the risk of an unexplained and unexaminable harsher sentence should he now elect to exercise that right:

> The inevitable effect of any such provision is, of cousre, * * * to deter exercise of the Sixth Amendment right to demand a jury trial.
>
> *United States v. Jackson*,
> 390 U.S. 570, 581 (1968).

It is of no moment that the placing of this price upon the right to jury trial may not be the purpose of the state's scheme. It is enough that the price is there, and that the

defendant is made to pay it. *United States v. Jackson, supra.*

Nor is there any similarity between the defendant's predicament in this case and the Court's decision in *North Carolina v. Alford*, 91 S. Ct. 160 (1970), with respect to guilty plea bargaining. The lack of similarity arises from the fact that here there is no bargain. Compare Christie and Pye, *Presumptions and Assumptions in the Criminal Law: Another View*, 1970 Duke Law J. 919. Had Mr. Rice pleaded guilty in the General County Court, upon advice of counsel and due record made so to assure adequate review of the voluntariness of his plea entered pursuant to an understanding that he was foreclosing jury trial in exchange for the hope of leniency, *Alford* would of course be on point. But Mr. Rice made no such plea, he entertained no such design, he stood upon his claim of innocence as he had every right to do, and nonetheless he was subjected to trial without jury. Again, had Mr. Rice a right of election, either to submit himself to the General County Court without jury but with hope of more lenient treatment than he might anticipate by electing trial by jury in superior court, or to submit to trial by jury in superior court, *Alford* might be relevant. He did not have any such choice, however, for the law of North Carolina gave him none. *Alford* is therefore wholly inapposite, and the decision is clearly controlled by *United States v. Jackson.*

Because the Respondent was deprived of right to trial by jury, and because even the postponed opportunity for jury trial was overlaid by an intimidating price, the decision in the court below must be affirmed.

Conclusion

For the Foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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Counsel for Respondent

APPENDIX

STATE OF MINNESOTA
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ATTORNEY GENERAL

Jacob L. Safron, Esq.
Assistant Attorney General
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P. O. Box 629
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Re: *North Carolina v. Rice*
No. 1325, October Term, 1970

Dear Mr. Safron:

Thank you for your letter of April 15, 1971, relating to the above matter. I have reviewed the de novo trial situation in Minnesota, to determine whether our experience would be of any assistance to you.

As you probably know, our Supreme Court, in *State v. Holmes*, 281 Minn. 194, 161 N.W.2d 650 (1968) held that it was improper, as a matter of judicial policy, "for the court to impose on a defendant who has secured a new trial a sentence more onerous than the one he initially received." 281 Minn. at 296. The Court expressly refrained from deciding whether the rule applies in de novo trial situations such as were involved in the *Rice* case.

Approximately one-third of all misdemeanor trials in Minnesota are held in Hennepin County (which embraces Minneapolis). In that county, our statutes provide that a defendant is entitled to a jury trial in municipal court only for certain specified offenses, such as driving under the influence of an alcoholic beverage. A defendant who is denied a trial by jury may obtain a jury trial, de novo, in district court. M.S.A. § 488A.10, subd. 6.

Although I understand that the Hennepin County District Judges have not been imposing heavier penalties upon defendants convicted following a de novo trial, the statistics

for 1970 provided by Mr. S. Allen Friedman, the Hennepin County Court Administrator, reflect that no flood of appeals has occurred:

Type of Trial	Number of Trials	Number of de novo Trials	De novo trials as a percentage of total
Criminal	2,257	46	.02
Traffic	5,208	57	.01

I also have some doubt as to the propriety of using the sentencing process to effect improvements in the court calendar. Sentencing, it seems to me, has not been designed as a tool to promote efficiency in the courts.

Where the de novo trial is a right created solely by the legislature, it would seem that that body should enact further legislation to resolve any problems resulting from the creation of the right, rather than delegating to the courts the *ad hoc* power to inflict on some (but not necessarily all) defendants a more severe punishment, for the sole purpose of deterring some future defendants from exercising their statutory rights. And in those cases (such as Hennepin County) where the de novo jury trial must be provided as a matter of constitutional mandate, deterring appeals by use of heavier sentences would seem to run afoul of *North Carolina v. Pearce*, 395 U.S. 711 (1969).

If you have extra copies of your brief, I would be interested in reviewing it. Because of the doubts I have expressed, and because our statistics do not provide support for your position, it does not appear that we will be able to join it.

Very truly yours,

Warren Spannaus
Attorney General

WS:lrl

cc: William W. Van Alstyne
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Duke University
Durham, North Carolina